IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 14TH DECEMBER 2007 / 23RD AGRAHAYANA 1929

CRL.A.No. 1561 of 2004()

SC.333/2003 of ADDL.SESSIONS COURT (ADHOC)-II, KOTTAYAM
.....

APPELLANT:

M.K.SUNIL, S/O. KESAVAN,
C.NO.8629, CENTRAL PRISON, TRIVANDRUM-695 012.

BY ADV. SRI.JAYAPRASAD.M.R. (STATE BRIEF)

RESPONDENTS:

STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR (SRI. K.C. SANTHOS KUMAR)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14/12/2007, ALONG WITH CRA NO. 2192 OF 2004, CRA NO. 17 OF 2005 & CRA NO. 1068 OF 2006 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B. KOSHY & K. HEMA, JJ.

Crl.A.Nos.1561 & 2192 of 2004,
17 of 2005 and
1068 of 2006

Dated this the 14th day of December, 2007.

JUDGMENT

Koshy, J:

Six persons were charge-sheeted for offence punishable under Sections 143,147, 148, 447, 341, 506 Part-II and 302 read with Section 149 of the Indian Penal Code consequent to the murder of one Varghese @ Kuttan. First accused was found guilty of the offence punishable under Section 302 of IPC and convicted thereunder. Accused Nos. 2 to 4 were found guilty of offence punishable under Sections 302 read with Section 34 IPC and convicted thereunder. Accused Nos. 1 to 4 were found guilty of offences punishable under sections 447 and 341 of IPC and the 2nd accused was found guilty of offence punishable under Section 506 Part-I of IPC and they were convicted thereunder. Accused Nos. 5 and 6 were found not guilty and they were acquitted of the said offences. Accused No.1 filed Crl. A.1068 of 2006. Accused No.2 filed Crl.A.No.1561 of 2004 accused No.3 filed Crl.A.No.2192 of 2004. Accused No.4 filed Crl.A.No.17 of 2005. In respect of

accused nos. 1 to 3, appeals were filed from jail and Since they were unable to engage counsel arranged they were represented by legal aid counsel by this Court.

2. According to prosecution Sugandhy, sister of A1 and A3 married to one Sasikumar committed suicide and incident occurred on the 16th day of the demise of Sugandhy. There was an allegation that said Sukumar (CW7) and his uncle Kuttan harassed Sugandhy which led to the death of Sugandhy and due to that accused were enmical towards deceased and the incident occurred on 16th day of the demise due to the dispute regarding the same. Deceased is the uncle of Sugandhy's husband Sasikumar. Accused nos. 1 and 3 are brothers of Sugandhy. Accused no.2 is uncle of Sugandhy. Accused no. 4 is the first cousin of Sugandhy. Accused nos. 5 and 6 were also closly related to her. It is the case of prosecution that the deceased Varghese @ Kuttan along with his wife and children were residing in house No.IX/422 of Mundakayam Panchayat situated at Kalackker Colony Bhagom at Panakkachira Kara in Erumeli North village. On 30.3.2003 at about 2.30 p.m. while Kuttan after eating his lunch, was sitting on MO8 chair at the north eastern

portion of the courtyard of his aforesaid house, accused nos. 1 to 4 came and encircled him and stabbed him on the chest with MO1 knife causing stab injures involving chest and abdomen. The second accused threatened PW1, who was standing near her husband Kuttan, with causing of her death by brandishing MO2 knife. On receiving the stab injury deceased fell down with the chair. He, thereafter ran away. The accused followed him. The deceased fell into the seat of an autorickshaw in the road. PW2, sister of the accused also ran behind the deceased and accused. With the aid of the people gathered there tool him into the same autorickshaw to the hospital and while undergoing treatment as inpatient in the Medical College Hospital, Kottayam, he succumbed to the injuries at 2.30 a.m. on 10.3.2003. On coming to know of the death, the wife of the deceased, PW1 in the early morning gave F.I. statement. Accused no.1 denied all the incriminating evidence against him when questioned under Section 313 Cr.P.C. and also filed written statement. Contents of the written statement are summarised by the Sessions Judge as follows:

> " .....while the first accused and others were praying for Sugandhy at her burial

> site in connecitoin with the obsequies on the 16th day of the demise of Sugandhy, the deceased Varghese @ Kuttan came to that place saying that the death of Sugandhy was not natural and she was hanged to death, and asking the first accused and others to get away with the bones of Sugandhy, if required. Hearing the said comment of the deceased the first accused lost his self-control and so the first accused and deceased were scuffled with each other and at that time CW7 Sasikumar also reached there and so the first accused with great difficulty escaped from that place".

In cross examination similar suggestions were made to the prosecution witnesses.

3. Before going into the details of the evidence, we may consider the post-mortem certificate proved by PW10, the doctor. Ext.P7 is the post-mortem certificate which shows the following ante-mortem injuries on the deceased:

1. Sutured incised wound with vertical limb and a horizontal limb. The vertical limb was 16 cm long in the midlife of front of abdomen extending between umbilicus and lower end of sternum. The horizontal limb 22 cm extending from the upper end of vertical limb to the left side of chest in the axillary line 6 cm. below axilla. Wound entered the left chest and abdominal cavities. Diaphragm on the left side found sutured. Front chest cavities and abdominal cavity contained small amount of blood (surgically modified injury).

2. Contused abrasions 5x1.5cm on the right side of forehead 3 cm out to midlife.

3. Abrasion 11x 2 cm on the front of right chest 11 cm. below middle of collar bone.

4. Sutured incised wound 1.5 cm horizontal on the right side of chest in the axillary line 12 cm. Below axilla (surgical)

5. Incised wound 1x0.3cm horizontal on the right side of front of abdomen 7.5cm away from umbilicus in the 8' O clock position (Surgical).

6. Abrasion 3x2.5cm. On the front of left forearm 8 cm above wrist.

7. Incised wound 1.5x1cm oblique on the left side of back of trunk in the posterior axillary line 22 cm. Below axilla. Abrasions 3x2.5cm seen on and around the above injury.

8. Abrasions 2.5x1.5cm on the left side of back of trunk 4 cm. below lower end of scapula.

9. Abrasion 1x1 cm on the outer side of right thigh, 16 cm below iliac crest."

According to him, deceased died due to stab injury to the chest and abdomen. The stomach contained undigested food articles. He also deposed that injury nos. 2, 3, 6, 8 and 9 and abrasions covered by injury no.7 could be produced in a fall. The incised wound covered by injury no.7 may be a surgical wound. He also stated that MO.1 knife can be the cause of injury No.1. He further

deposed that abrasions mentioned injury No.7 can be caused in a scuffle. The medical evidence also shows that Kuttan died only after he reached the hospital and when he reached the hospital he was conscious. PW11 examined him when he was brought to hospital and he issued Ext.P8 wound certificate. It is stated in the wound certificate that he was conscious and history of the injury and cause of injury was stated as follows:

"

"

(Injury is inflicted by one Sumesh with a knife today noon at Panakkachira) Only one injury was noted in the wound certificate, that is, oblique 6 cms long incised wound in the epigastrium 3 cms deep. This corresponds to injury No.1 in the post-mortem certificate and other injuries mentioned in the post-mortem certificate are surgical injuries or abrasions caused in a scuffle. Therefore, there is only one injury, injury no.1, mentioned in the post-mortem certificate is the cause of death and only one person was involved in the incident.

4. PW2 is the sister of deceased who is the mother of Sasikumar and mother-in-law of Sugandhy. She saw the incident

while she was coming from family house. She sawaccused 1 to 4 were surrounding deceased and accused No.1 inflicting injury on Kuttan and he fell down and ran. Accused 1 to 4 ran behind them. Accused 5 and 6 were standing near the house. All persons ran away. She followed injured Kuttan and by the time she reached near him Kuttan already fell down in an autorickshaw. She took Kuttan in that autorickshaw with the help of the people gathered there to the hosptial at Mundakkaayam Govt. Hospital. Thereafter to Kanjirappally Govt. Hospital. The doctor examined him and advised that he should be taken to Medical College Hospital, Kottayam for better treatment. Thus, deceased was taken to Medical College Hospital, Kottayam. At about 2.30 a.m. he died. She identifiedMO1 knife alleged to have used by first accused and MO2 knife alleged to be used by 2nd accused. The dresses worn by accused were also identified by her. She stated that she only talked to the doctor when she was taken to Kanjirapply hospital and she immediately given the name of third accused Sumesh by mistake as the person who inflicted injury. The cut injury can be caused by MO.1 knife by A1 who is the elder brother of Sugandhy. In this connection, we again refer to

the evidence of PW11. In Ext.P8 wound certificate issued by him it is not stated the cause of injury. It was stated that injured was conscious. Whether he was able to speak or not was not mentioned in the wound certificate. But injury no.1 was very serious and according to the doctor cause of injury was stated by the woman who brought him to the hospital. According to the doctor, the cause of injury was stated by the wife. He also sated that patient was brought by the wife. But in examination in chief he clarified that she did not remember the same

> " I got the information that the alleged cause was revealed by the wife of the patient. Is it not correct to say that the alleged cause was disclosed by the sister of the patient (Q). I do not remember."

She further stated that patient was conscious at the time of admission in the hospital and it is recorded that patient was brought by his wife. But PW1 stated that she did not go to Govt. hospital, Kanjirappaly. PW2 sister stated that she used to commit mistake in the names of brothers of Sugandhy. It is the elder brother PW1 who caused caused injury with MO1. We are of the opinion that most probably that PW2 herself must have stated to the doctor. But it is pertinent to note that evidence of PWs 1 and 2 would reveal that first accused to elder brother of Sugandhy,

caused the injury but it is recorded in Ext.P8 by mistake that accused no.3 Sumesh, the younger brother, caused the injury.

5. Now, we will come to the evidence of PW1, wife of the deceased, who gave F.I. Statement. According to her, she saw the incident at 2.30 p.m. The incident occurred at 2.30 p.m. when her husband was sitting in the courtyard after his meals. At that time 4 persons came inside. They are accused nos. 1 to 4. They surrounded him and second accused made a pleasant enquiry ".....and he replied that there is no special occurrence. Immediately, first accused stabbed with the knife that struck on the chest. She was sitting near to the husband. Second accused brandished her with a knife. Her husband fell down and thereafter he ran away.The accused persons ran after them. Accused nos. 1 and 2 had a knife with them. Accused nos. 4 and 5 were standing in the road. All of them ran away. She, instead of going after the husband, being afraid, went to the family house. But behind the injured husband's sister PW2 moved speedily behind Kuttan. PW1 thereafter went to Medical College Hospital. By that time her husband was admitted in the intensive care unit and he died at

2.30 a.m. She gave Ext.P1 first information statement to the police. She also identified MO1 knife as the knife with accused no.1and the shirt and kaily worn by first accused as MO3 and MO4. The dress of the deceased was marked as MO5 and the chapels worn by deceased are marked MOs 6 and 7. She also stated that accused 1 and 3 are brothers of Sugandhy. She stated that Sugandhy committed suicide and accused was therefore inimical towards them. In cross-examination she stated that on the 16th day of demise this incident occurred. To some of the questions she did not answer. She also stated that Sugandhy was buried on the south-east side of her house. She denied the suggestion that MO1 knife was her household article. She also stated that her house is surrounded by many other houses and Sugandhy and her husband also lived in their house. She also stated that among the accused there was one Jose also. So, the evidence of PW1 would show that her husband sustained injury and ran towards the road and she did not follow and she went to the Medical College Hospital when her husband was in the intensive care unit and it is A1 who inflicted injury on the deceased.

6. PW3 is the son of deceased. He was studying in 9th Standard. According to him, he was there at that time and he also stated that accused nos. 1 to 3 after going to the place where Sugandhy was buried came to the house and surrounded his father and accused No.1 inflicted the injury. The second accused brandished his mother with a knife. Accused 1 and 2 ran with the knife. He and his mother went to the family house and his mother went to the hospital only in the night. He also stated that burial place of Sugandhy was on the south-east portion of his house. After sustaining the injury, father ran towards north side. PW4 is stated to be a neighbour who saw accused 1 to 4 going to the house of deceased. In Ext.P9 plan several houses of neighborus were marked but house of PW4 was not marked and it is very difficult to believe the evidence of PW4. PW is conducting a shop on the road side. He saw 4 persons going towards the house of deceased. Thereafter the incident occurred. So he also identified accused nos. 1 to 3 and he was not sure whether 4th accused was going to the place of incident. If they were going to the place where Sugandhy was buried they had to walk in the same direction.

7. It has come out in evidence that MO1 knife was recovered on the basis of the confession by first accused. Ext.A13 chemical examination report shows that MO1 contained bloodstains of the same blood group as that of the deceased. But the dress of the accused contained no bloodstains. It is not disputed that Sugandhy had unnatural death and the incident occurred on the 16th day of her demise. Even Section 313 statement tallies with the evidence of PWs 1 to 3 to the effect that the accused suspected death of Sugandhy due to harassment by Sasikumar and the deceased. According to the accused, while they were offering prayers at the burial place, deceased came there and he stated that the death of Sugandhy was not natural and she was hanged to death and asking the first accused and others to get away with the bones. Then scuffle occurred with 1st accused. It is pertinent to note that chapel of the deceased was found out very near to the place of the burial ground. In the scene mahazar it is stated that the bloodstained watch was found in the south-east corner of the compound wall and the place where Sugandhy was buried was also on the south-east corner. Therefore, the incident occurred in between the

compound wall of the house of deceased and the burial place of Sugandhy. But if PWs 1 to 3 are believed after receiving the injury he ran towards the northern direction of the rod. If he has went to northern direction as stated by PW1 there would be no bloodstains on the north-east corner and the chapel of the deceased would not have been found out from that direction near to the burial place of Sugandhy even the burial place of Sugandhy was only 20 metres away from the compound of the house of deceased Sugandhy. So it can be seen that witnesses were not telling the correct facts.

8. The accident occurred at 2.30 p.m. Deceased was taken to Govt. Hospital, at Kanjirappally and then to Medical College Hospital, Kottayam. But before death nobody was informed. PW5, who was the shop owner, PW4 etc. gathered when deceased fell down. According to PW2 and PW3, large number of people gathered there when he was taken to hospital. There is no explanation whey no one gave F.I. Statement at that time and only on the next morning the wife of deceased gave F.I. statement when the police went to the Medical College Hospital. Police took statement from the wife only in the morning at 7 A.M.

even though death occurred at 2.30 A.M. Even assuming that delay in giving F.I. Statement is justifiable there is no explanation for the delay in reaching the F.I. statement to the Magistrate Court. F.I. Statement received at 7 A.M. at the house was registered at 9.30 A.M. on 31.03.2003 at the Police Station. Magistrate Court was very near to the Police Station. But F.I.R. reached the Magistrate only on 1.4.03.It is also pertinent to note that prosecution failed to examine the police officer who recorded the F.I. statement. Accused was denied opportunity of asking that officer for the delay occurred in sending the F.I. statement to the Court. The Investigating Officer also did not give any explanation regarding the delay in sending the F.I. statement to the court. This adds suspicion to the prosecution story. We also note that first accused in 313 statement stated that he was questioned by husband of Sugandhy (CW7) and deceased at the place where deceased Sugandhy was buried. Why Sasikumar (CW7) was not examined is also not stated by the prosecution. So the prosecution was not placing whole truth before court and there was intentional suppression. Of course, the accused were represented by State Brief and effective cross-examination was

not done. Even though the delay in lodging the F.I.R. and forwarding the same to the Magistrate is not fatal, but it should be scrutinised carefully. After considering the evidence, we are of the opinion that genesis of of the case was suppressed by the prosecution and incident occurred not in the manner as put forward by the prosecution. At the maximum, it can be gathered that on the 16th day of the demise of Sugandhy there was a scuffle between 1st accused and other near relatives on one side as well as deceased Kuttan etc. on the other side and Kutttan died due to stab injury inflicted by A1 by MO1 knife and the incident did not occur in the manner in which prosecution has tried to establish. Presence of the accused at the place of incident is justified as it was the 16th day of demise of Sugandhy as usually relatives will go to the burial place. So, it cannot be said that they went with pre-planned intention for murdering the deceased. There is no acceptable evidence to connect A2 to A4 with the incident. Though PW2 was present in the house, she was also not stating the correct facts. But from the evidence, it is clear that because of the injury caused by A1 by using MO1 knife death occurred and the injuries occurred in a scuffle. The

313 statement by first accused shows that there was a scuffle when deceased has scolded them at the place where Sugandhy was buried and in the scuffle fatal injury was caused by A1. MO.1 weapon was recovered on the basis of disclosure statement of A1. Injury caused by A1 is sufficient in the ordinary course of nature to cause death. Everything happened in a scuffle occurred on the spur of the moment in a heat of passion. But, there is no evidence to show that accused 2 to 4 were having any knowledge that first accused was having knife with him or they shared common intention of causing serious injury on the deceased. But it is proved that injury was caused by first accused. Therefore, first accused alone can be punished for committing the offence punishable under Section 304 Part-I. Therefore, conviction and sentence entered against accused 2 to 4 are not sustainable. There is absolutely no evidence to show that they shared common intention to cause murder of deceased. Admittedly they did not cause any injury to the deceased. So, their conviction and sentence passed under Section 302 IPC are set aside and they are acquitted.

We set aside the conviction and sentence entered against accused Nos. 2 to 4 for offence punishable under Section 302 IPC read with Section 34 IPC and they are acquitted of the said offence. They should be set at liberty forthwith if they are not required in any other case.

Conviction and sentence passed against accused No.1 for offence punishable under Section 302 IPC are set aside. Instead, he is convicted for offence punishable under Section 304 Part-I IPC and sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.5000/-. In default of payment of fine, he has to undergo simple imprisonment for 6 months. Set off under Section 428 of Cr.P.C. is allowed.

In the result, Crl. Appeal Nos. 1561 & 2192 of 2004 and 17 of 2005 are allowed. Crl.A.No.1068 of 2006 is partly allowed.

Sd/-

J.B. KOSHY, JUDGE.

Sd/-

K. HEMA, JUDGE.

krs.

J.B. KOSHY & K. HEMA, JJ.

Crl.A.Nos.1561 & 2192 of 2004,
17 of 2005 and
1068 of 2006

14th day of December, 2007.

JUDGMENT